Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association ("APPA"), on behalf of the Nation's publicly-owned electric utilities, submits these reply comments in response to comments on the Public Notice[1] issued by the Wireless Telecommunications Bureau ("WTB") of the Federal Communications Commission ("FCC" or "Commission") seeking input on a Petition for Declaratory Ruling on certain wireless siting policies submitted by Mobilitie, LLC under Section 253 ("Mobilitie Petition").[2] APPA files these comments for the limited purpose of responding to various commenters[3] who suggest that the Commission should improperly extend the scope of

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1 *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (2016) ("Public Notice").

2 Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way,* filed Nov. 15, 2016.

3 See, e.g., comments of AT&T, Mobilitie, T-Mobile, Verizon, and the Wireless Industry Association.

this proceeding beyond the purview of Section 253 of the Communications Act[4] to issues surrounding wireless attachments on municipally-owned electric utility poles.

While the ostensible focus of this proceeding is on Mobilitie's assertion that local government right-of-way ("ROW") regulations and zoning requirements impede the ability of wireless carriers to deploy small cell wireless facilities in a timely manner, Verizon and some other commenters request that the Commission use Section 253 to override Section 224,[5] which prohibits the Commission from regulating municipally-owned electric utility poles. As discussed below, not only is such action unnecessary and unwarranted, but it is also outside the scope of the Commission's authority and in plain contradiction to Congress's intent in Section 224 of the Communication Act.

I. INTRODUCTION AND BACKGROUND

A. APPA

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities[6] serve, and the 93,000 people they employ. Approximately 70 percent of APPA's members serve communities with less than 10,000 residents.

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4 47 U.S.C. § 253.

5 47 U.S.C. § 224.

6 Many public power utilities are municipal utilities (a utility owned by a municipality). The ones that are not owned by a municipality are still governmentally owned. Examples include public utility districts, irrigation districts, and state-created entities that serve areas larger than a municipality. Given that the commenters in the docket use the terminology "municipal utility," we use it throughout the document, but our reply comments are applicable to all public power utilities.

B. BACKGROUND

Mobilitie is a wireless infrastructure provider. As part of its business model, Mobilitie seeks access to the public ROW to install "small cell wireless" facilities on, among other things, existing electric utility poles, streetlight poles, and new wireless support structures. Mobilitie maintains in its petition that it has experienced unfair and unreasonable wireless siting and ROW management practices that have frustrated its ability, and the ability of other wireless carriers, to obtain access to the public ROW to deploy new 4G and 5G wireless broadband facilities. Mobilitie requests that the Commission use it preemptive authority under Section 253 of the Communications Act to impose a one-size-fits-all regulatory scheme that would limit the long-standing ability of local governments to manage the public ROWs.

In issuing a Public Notice on the Mobilitie Petition, the WTB invites public input on potential Commission actions to help expedite the deployment of next generation wireless infrastructure "by providing guidance on how federal law applies to *local government review of wireless facility siting applications and local requirements for gaining access to rights of way*."[7] Despite the stated focus of the Public Notice and the Mobilitie Petition on State and local government regulatory practices concerning the review and processing of wireless siting applications, and access to public ROWs, a small handful of commenters have sought to broaden the scope of the inquiry to call for mandatory regulated access to municipally-owned structures within the public ROWs, including municipally-owned electric poles.[8]

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7 Public Notice, at 1 (*emphasis* added).

8 See comments of AT&T, at 17-22; Mobilitie, at 20-21; T-Mobile, at 30-33; Verizon, at 8-12, 17; and the Wireless Industry Association, at 20, 70.

While it is perhaps not surprising that these providers are seeking to lower their input costs and thereby maximize their profits, their arguments are not only unsubstantiated, but wholly outside the scope of the Commission's authority, and should be rejected.

II. SECTION 253 CANNOT BE USED TO REGULATE MUNICIPAL UTILITY POLES THAT ARE EXEMPT FROM FEDERAL REGULATIONS UNDER SECTION 224

APPA shares the Commission's desire to accelerate the pace of broadband deployment and adoption, including the widespread availability of new and emerging wireless capabilities throughout the country. In fact, public power utilities have been at the forefront of encouraging broadband deployment and adoption in their respective communities, including the adoption of innovative bulk deployment and streamlined make-ready procedures.[9] The desire of telecommunications companies to rapidly and cheaply deploy broadband should not, however, impair the ability of public power utilities to maintain the safety of their linemen or the security and/or reliability of their electric systems.

A. The Commission Does Not Have Regulatory Authority Over Attachments to Municipal Utility Poles

1. Municipal utilities are explicitly exempt under Section 224

The Commission lacks the statutory authority to regulate wireless access to public power utility poles. As the Commission has consistently recognized, the FCC "does not have authority

[9] For example, as noted in the FCC's draft *Notice of Proposed Rulemaking and Notice of Inquiry, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (*NPRM/NOI*), ¶ 24, released March 30, 2017, CPS Energy of San Antonio, Texas, has adopted an innovative one touch make ready pole attachment process. Significantly, as the *NPRM/NOI* notes, CPS Energy's procedure is a "utility-adopted approach as opposed to a government adopted approach."

to regulate attachments to poles that are municipally or cooperatively owned."[10] The Pole Attachment Act, codified at 47 U.S.C. § 224, imposes federal pole attachment requirements only upon entities that meet the definition of "utility" in Section 224(a)(1). The term "utility" is defined to exclude local governments, cooperatives, and railroads:

> The term "utility" means any person whose rates or charges are regulated by the Federal Government or State and who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for any wire communications. *Such term does not include* any railroad, any person who is cooperatively organized, or *any person owned by the federal government or any State*.[11]

Section 224(a)(3), in turn, defines "State" as "any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof." Congress concluded that this "municipal and cooperative exemption" in the Pole Attachment Act was necessary "because the pole attachment rate charged by municipally owned and cooperative utilities [were] already subject to a decision-making process based upon constituent needs and interests."[12] This rationale still holds true today.

2. Section 253 does not apply to municipal utility poles

Recognizing that municipal utilities are not subject to Section 224 federal pole attachment regulations, some wireless carrier commenters in this docket attempt to assert Commission jurisdiction over municipal utility poles by arguing that pole attachments are part of the public ROWs and are therefore subject to Section 253. The efforts by these wireless carriers' to conflate

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10 See, e.g., *Report and Order, In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Appendix B, ¶ 46, released April 7, 2011.

11 *Id*. (emphasis added)

12 S. Rep. No. 95-580, 95th Cong., 1st Sess. 17-18 (1977).

access to municipally-owned utility poles with local regulation of the ROWs are misplaced, and should be rejected.

Section 253 provides:

SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL. -- *No State or local statute or regulation, or other State or local legal requirement,* may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. -- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. -- *Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way* on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) *If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section,* the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[13]

Section 253 clearly, on its face, pertains to government-owned ROW, where a local government is acting in its capacity as a regulator. It has no bearing on when a local government is acting in a proprietary capacity, such as when it leases access to an electric utility pole it owns because the community operates its own electric utility.

[13] 47 U.S.C. § 253 (*emphasis* added).

a. Section 253(c) applies to rights-of-way, not utility poles

The effort by some wireless carrier commenters to conflate access to the "rights of way" under Section 253(c) to access to municipal utility poles is not supported by the statutory language or congressional intent. Section 253(c) speaks only in terms of states and local governments providing access to "rights-of-way" in a competitively neutral and non-discriminatory manner. Not to be deterred by the actual statutory language, T-Mobile argues that the provision should be interpreted as including access to municipal utility poles, stating, "[i]f Congress meant to exclude municipal-owned poles or ROW from the statutes, it would have done so explicitly.[14]

This argument, of course, completely ignores the fact that the statute explicitly excludes municipally-owned utility poles in Section 224. Congress clearly understood the distinction between ROWs and poles, as is evidenced by the fact that Section 224, which was amended in the 1996 Telecommunications Act at the same time as Section 253 was enacted, explicitly applies to "poles, ducts, conduits and *rights-of-way*," whereas Section 253 only mentions "right-of-way."

Further, the legislative history of the municipal pole attachment exemption demonstrates that Congress intended that access to municipal utility poles be addressed at the state and local level by their consumer-owners. Congress explained its rationale as follows:

> Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and interests, § 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. *These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems*.[15]

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14 T-Mobile, at 33.

15 S. Rep. No. 95-580, 95th Cong., 1st Sess. 17-18 (1977) (*emphasis* added).

Significantly, when Congress amended and expanded the federal pole attachment regulations under Sections 224 and adopted Section 253, it chose to keep the municipal pole attachment exemption in place as part of the Telecommunications Act of 1996.

AT&T's suggestion that the Commission should find that municipal utility pole attachment fees are unreasonable and in violation of Section 253 if they exceed the Commission's Section 224 telecommunications pole attachment rate formula should similarly be dismissed.[16] By explicitly exempting municipal utilities from the Commission's pole attachment rate regulations under Section 224, Congress did not intend for municipal utilities to implicitly be subject to such rate regulation under Section 253, which regulates a wholly separate matter. As the legislative history shows, Congress clearly understood and allowed municipal utilities to charge different rates than that which would be allowed under the Section 224 rates based on a balancing of the needs of the local constituent owners.

Contrary to the characterization of municipal utilities as "profiteering,"[17] public power utilities are the representatives of the consumers who both own the poles and benefit from the services provided over the facilities attached to these poles. As a result, municipal utilities are inherently incentivized to provide reasonable access and to apportion the costs of constructing and maintaining their poles in an equitable manner among all attaching entities. This apportionment balances the interests of public power communities as electric consumer-owners and consumers of communications services, and ensures that public power customers do not unfairly subsidize deployment of infrastructure for an unrelated service that they may or may not choose to use.

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16 AT&T, at 21.

17 Wireless Industry Association, at 70.

b. Access to municipal utility poles is a proprietary activity

As evident from the excerpted language above, the substantive requirement of Section 253(a) applies to state or local "statutes," "regulations," or "legal requirements." The Commission and courts have previously concluded that these provisions relate to state and local governments when they are acting in their regulatory capacity – e.g., issuing permits for the use of the public ROWs – as opposed to when they are acting in a proprietary capacity, such as when they lease or rent utility facilities or property.[18] Indeed, citing these decisions, the Commission affirmed this distinction in its *Wireless Siting Order,* in which it imposed various limitations on the ability of State and local governments to regulate the siting of wireless facilities:

> As proposed in the Infrastructure NPRM and supported by the record, we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. As discussed in the record, courts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that

[18] *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity").

> Sections 253 and 332(c)(7) of the Communications Act do not preempt "non-regulatory decisions of a state or locality acting in its proprietary capacity."[19]

Mobilitie nevertheless attempts to argue that access to municipal utility poles should not be considered a proprietary activity because "municipal rights of way and structures within them are public property that serves public function" and, therefore, "they are not in any way 'private' or 'proprietary' the way a privately-owned building is."[20] T-Mobile makes a similar argument and cites *NextG of New York v. City of New York*, a case where a federal district court in New York rejected the City of New York's argument that its bidding process for allocating rights to make wireless attachments to city streetlights was a proprietary activity, finding instead that the City's activities "were taken pursuant to regulatory objectives or policy."[21]

Mobilitie's naked assertion that all municipally-owned structures and property within the ROW are public property, and, therefore, the use and control of such property is not a proprietary activity, is unsupported by any legal analysis. It not only ignores countless federal and state court decisions finding that the provision of electric service by a municipal electric utility is a proprietary activity, but it also would mean that wireless providers and other communications providers could commandeer access to municipal utility fiber and other assets that are located within the public ROWs.

T-Mobile's argument does not fare any better. The *NextG* decision is not applicable and needs to be read in context. In *NextG*, the municipality denied a wireless carrier access to city-

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19 *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (F.C.C.), 30 FCC Rcd. 31, 2014 WL 5374631, at ¶ 239 (rel. October 21, 2014 ("*Wireless Siting Order*") (internal citations omitted).

20 Mobilitie, at 20-21.

21 *NextG of New York v. City of New York*, 2004 WL 2884308 (S.D.N.Y. 2004).

owned streetlights until the city had completed a solicitation of competitive bids for access to the streetlights. In viewing the city's siting and authorization process for the use of the streetlights and ROWs, the *NextG* court found that the city was involved in a "general franchising scheme" that was not purely proprietary in nature, but rather, was taken in furtherance of the city's regulatory objectives and policies. The court quoted the city's own franchising documents as indicating that it was seeking to "support the availability of robust, reliable, high-quality mobile services," while also protecting the "public interest in a streetscape that is safe, not excessively cluttered in appearance, and otherwise consistent with City use of the relevant facilities and their surroundings," and that city council had "determined that the granting of such franchises will promote the public interest, enhance the health, welfare and safety of the public and stimulate commerce by assuring the widespread availability of reliable mobile telecommunications services."[22]

Thus, it was the city's own reliance upon its governmental objectives in regulating the public ROW and its governmental responsibility to manage the health, safety and public welfare through the franchise process, that took NextG's streetlight pole attachment requests outside of the realm of a proprietary activity. That is not typically the case with access to municipal utility poles, where access to the poles is controlled and administered by the utility department and completely independent of any underlying authority to occupy the public ROWs, which may be authorized by a local government. In this sense, it is no different than a cable or wireline telecommunications provider that obtains a cable franchise or a ROW use agreement with the local government, and separately enters into a pole attachment agreement with the private or public utility pole owners.

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[22] *Id*, at *5.

The fact-specific nature of the *NextG* case also underscores the need for the Commission not to attempt to adopt uniform rules, but instead allow such issues to be addressed on a case-by-case basis.

Further, not only do public power utilities not have governmental or regulatory authority over private wireless carriers, but, in many instances, public power utilities are separate corporate entities from the local governments that may own the public ROWs. For example, the electric service territory of many municipal electric utilities extends well outside of the corporate territorial boundaries of the municipality of which they were created. In such cases, the municipal utility typically has to obtain access to the public ROWs from the local jurisdiction in a similar manner as other users of the ROWs. Similarly, many public power utilities were created as independent agencies or districts, and therefore, while government owned, they are not part of any particular local governmental entity, and they do not exercise any control over the use of the public ROWs.

B. No Compelling Evidence That Municipal Utilities Are Unreasonably Denying Access

Not only does the Commission lack the statutory authority to regulate wireless access to municipal utility poles, but the wireless carrier commenters who have made this recommendation have also not put forth a compelling argument as to why any such regulations are needed. Relying solely on overblown claims of harm, these wireless carriers have failed to present any actual evidence that municipal utilities are unreasonably denying them access to utility poles. Nor have these wireless carrier commenters shown that municipal utilities are hampering small cell wireless deployments to any substantial degree.

There is no evidence that municipal utilities are unreasonably denying access to their electric utility poles. In most instances, utilities are fully cooperating with wireless providers, and the traditional negotiation process is working. Access to electric utility poles raise unique

operational and safety issues that are utility specific and need to be addressed based on operational requirements and capabilities.

While the wireless industry euphemistically characterizes their wireless facilities as "small," and no larger than a "pizza box," the reality is that these devices are only small *when compared to* traditional macrocell facilities, which are, in fact, very large. As NATOA notes, "simply calling this equipment 'small' doesn't make it so."[23] Indeed, one only need look at the descriptions of "small wireless facilities" introduced by wireless companies in bills submitted to state legislatures around the country to see that these are, by no means, "small" or "unobtrusive." For example, many of these bills would define a "small wireless facility" as having "(1) an antenna with an enclosure exterior displacement volume of no more than six cubic feet;" and "(2) associated equipment with a cumulative enclosure exterior displacement volume no larger than 28 cubic feet."[24]

Safely accommodating these attachments on utility poles is much more complex than what is involved in accommodating a traditional horizontal wireline attachment in the communications space. Not only do wireless attachments take up significantly greater vertical space on the pole, but they are also often situated in and above the electric space, raising significant safety and operational issues. Further, such attachments create issues related to radio frequency ("RF") exposure to linemen working on and around such facilities, and create potential RF interference to utility systems. Given the complexity of these myriad issues, industry's claims that such wireless

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23 NATOA, et al, at 11.

24 See, for example, the definition of "small wireless facility" in pending Missouri House Bill H.B.656, "The Uniform Wireless Communication Infrastructure Deployment Act," http://www.house.mo.gov/billtracking/bills171/hlrbillspdf/1391H.02C.pdf

attachments can be easily accommodated by cookie cutter, one-size-fits-all solutions by regulatory fiat are, at best, disingenuous.

Further, while the wireless carrier commenters point to an anticipated surge in the need for wireless small cell deployments and "densification" to meet 5G and other emerging wireless needs, these are, at best, unsubstantiated projections as to what may be needed in the future. As the comments of Colorado Municipal League note, the reality is that, in many areas of the country, there has only been "a moderate demand for permits" to allow the siting of small cell facilities within the public ROWs, and in other parts of the country there has been no such demand.[25] Similarly, as NATOA notes,

> The coverage data provided by the wireless industry does not seem to indicate that local government practices hinder the provision of wireless service to the residents or business across the country. Instead, the greatest barrier to the provision of service is the population density of a given local community (urban versus rural), and the relative profitability of the market in that location.[26]

Assertions made by the wireless industry in comments to the Public Notice notwithstanding, the traditional pole attachment negotiation process is working, and there is simply no credible basis for the Commission to interject itself in to a matter of local control recognized in Section 224 of the Communications Act to impose a federal solution to solve a problem that does not exist.

III. CONCLUSION

Given the explicit municipal exemption from pole attachment regulation under Section 224, any such action by the Commission would be clearly outside the scope of its authority under

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[25] Colorado Municipal League, et al, 6.

[26] NATOA, et al, at 7.

Section 253. Moreover, there is simply no evidence that municipal utilities are not providing wireless carriers with access to their poles and other facilities under the utilities' control pursuant to reasonable rates, terms, and conditions, when and where such access can be provided, without risking the safety of their linemen or the secure and reliable operation of their electric systems.

Based on the foregoing, APPA urges the Commission to reject the suggestions of some wireless industry commenters and not expand the scope of this inquiry to include access to municipal utility poles.

Respectfully Submitted,

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